Office Supreme Court, U.S.
FILED
MAR 30 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

HENRY TURNEY _____ *Appellant*

v. No. 967

STATE OF ARKANSAS _____ *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

BRUCE BENNETT
Attorney General

By: RICHARD B. ADKISSON
Chief Assistant Attorney General
Attorneys for Appellee

PARAGON PRINTING CO., LITTLE ROCK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

HENRY TURNEY ..... *Appellant*

v. No._____

STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above entitled action upon the grounds that the appeal (1) does not present a substantial federal question, and (2) the federal questions sought to be reviewed were not timely nor properly raised, nor expressly passed upon by the Supreme Court of Arkansas.

STATEMENT

On February 19, 1962, information was filed by the District Prosecuting Attorney charging appellant, jointly with George Williams, Marvin Stripling and Jess Holeman, with burglary and grand larceny. Appellant was arrested on this same day under authority of a warrant which had been issued for his arrest (R. Vol. 1, 1; Vol. 2, 82).

Marvin Stripling and Jess Holeman had been arrested the preceding evening and had implicated appellant in the crimes. At the time of Holeman's arrest his house was searched under authority of a void search warrant, but the officers found nothing in this search. However, stolen articles were found in a pickup truck parked in front of the house (R. Vol. 2, 79). The following day appellant's trailer was searched with his consent (R. Vol. 2, 88).

Trial was begun on November 1, 1962 (R. Vol. 2, 1). Prior to trial appellant moved the court to suppress evidence illegally obtained through illegal search and seizure and coerced confessions (R. Vol. 1, 45, 46).

The Supreme Court of Arkansas did not mention in its decision the first two questions presented, found appellant waived the search and seizure question, and since appellant failed to request proper instructions, allowed the jury to pass on the voluntariness of the confession. The opinion below of the highest court of the State of Arkansas is styled *Williams, et al* v. *State*, 237 Ark. 569, 375 S.W. 2d 375 (Jan. 27, 1964).

QUESTIONS PRESENTED

1. Were appellant's rights violated when he was tried under an information filed by the district prosecuting attorney rather than under an indictment returned by a grand jury. Is this question reviewable by the Supreme Court where appellant failed to follow reasonable state procedural rules in raising the question.

2. Was appellant entitled to counsel before he was questioned concerning the crime where he did not request an attorney. Is this question reviewable by the Supreme Court where appellant fails to follow reasonable state procedural rules in raising the question.

3. Did appellant waive the search and seizure provisions of the Fourth Amendment by consenting and participating in the search. Is this question reviewable by the Supreme Court where a factual question of consent was determined adversely to appellant in the state court.

4. Is the question of the voluntariness of appellant's accomplices' confessions substantial where a similar confession by appellant was indisputably voluntary. Is this question reviewable by the Supreme Court where appellant failed to request the court to instruct the jury on the confessions as required by state procedural rules.

MICRO CARD 22

TRADE MARK ®

PC194

MATTHEW BENDER & COMPANY

MB

59-6

m

microcard

ARGUMENT

The obvious reason the Arkansas Supreme Court did not rule on questions one and two is that the alleged errors were not preserved for review on appeal. The defendant did not specifically object to the information or lack of assistance of counsel on the grounds here alledged as error. In Arkansas before an alleged error in felony cases, for a lesser degree than capital, may be considered on appeal the complaining party must make an objection, obtain a ruling from the trial court, make and preserve an exception from the adverse ruling, and the matter complained of must be assigned as error in a motion for a new trial. *Carter* v. *State*, 230 Ark. 646, 326 S.W. 2d 791 (1959); *Ford* v. *State*, 222 Ark. 16, 19, 257 S.W. 2d 30 (1953). The Arkansas appellant court does not review errors which the circuit court was not asked to correct. The objection must be specific in order to afford the trial court an opportunity to rule on the question urged as error on appeal. *Heath* v. *State*, 207 Ark. 425, 181 S.W. 2d 231 (1944). It is contemplated that before trial, the defendant shall present such objection as he cares to make where there is want of formality in the indictment or information. *Geoates* v. *State*, 206 Ark. 654, 177 S.W. 2d 919 (1944).

A litigant must follow state procedures in raising federal questions. When required by state practice, the federal question must be raised before the trial court. A state may attach reasonable time limitations to the assertion of federal constitutional rights and such limitations must be respected. *Michel* v. *Louisiana*, 350 U.S. 91, 97; *Mutual Life Insurance Company* v. *McGrew*, 188 U.S. 291, 309; *Bailey* v. *Anderson*, 326 U.S. 203, 206-7; *Stembridge* v. *Georgia*, 343 U.S. 541, 547.

In addition to appellant's failure to properly raise in the trial court the indictment by a grand jury or charge by information question, it has been so explicitly foreclosed b prior decision of the Supreme Court as to leave no room for real controversy. *Equitable Life Insurance Society* v. *Brown*, 187, U.S. 308, 311. This question has been decided contrary to appellant's contentions in *Gains* v. *Washington*, 277, U.S. 81; *Hurtado* v. *California*, 123 U. S. 131; and *Washington* v. *State*, 335 U.S. 884.

Appellant has raised the question of assistance of counsel for the first time in his notice of appeal. Although appellant failed to properly and specifically raise the question, there could be no error since defendant failed to specifically request assistance of counsel as required by *Escobedo* v. *Illinois*, ... U.S. ..... 12 L. ed. 2d, 977, 84 S. Ct. 1758.

By question three appellant alleges evidence was submitted at the trial which was obtained as a result of an illegal search and seizure. The evidence was conflicting as to whether officers advised the defendants they had a search warrant to search Holeman's house trailer, which house trailer Turney claimed belonged to him; however, it is undisputed that officers did not exhibit a search warrant to the defendants before searching "Holeman's" house trailer (R. Vol. 2, 118; Vol. 3, 33). This house trailer was apparently several miles from Holeman's house where an invalid search warrant was issued after demand by Holeman.

After noting this Court's decision in *Mapp* v. *Ohio*, 367 U.S. 643, and pointing out that the search made under authority of the invalid search warrant was to no avail, the Arkansas Supreme Court determined appellant consented to and participated in the search of the house trailer:

"After the confessions of Stripling and Holeman, as heretofore mentioned, warrants were obtained for the arrest of Williams and Turney; and in the early morning of February 19th they were arrested. According to the State's evidence, Turney told the officers that the stolen property was stored in a trailer near the settlement of Greenbrier in Faulkner County, several miles from Conway. Turney and Williams accompanied the officers to Greenbrier and pointed out the house trailer, and Turney unlocked the door to the trailer; and nearly all of the stolen property was found in the said house trailer. Tourney and Williams assisted the officers in taking the articles out of the trailer and loading them into a truck so the articles could be returned to Nelson, the owner. Were the appellants' constitutional protections against unreasonable search and seizure violated by the officers thus obtaining the articles from the trailer and detailing the evidence concerning same? Here, there was evidence, not only of waiver and consent, but also of active participation in the search; so there is no merit to the contention of the defendants that their rights against unreasonable search and seizure were violated insofar as concerns the articles in the trailer.

* * *

The State's evidence further showed that after the articles from the house trailer had been recovered, as above mentioned, the officers asked Turney if there were any more stolen articles; and Turney said there was a hot water tank and sink at the home of his father-in-law a short distance away from the house trailer. The party of Turney,

Williams and the officers, proceeded to that house. Turney and Williams went inside and brought out the hot water tank and sink, which were placed in the truck to be returned to Nelson. The officers asked Turney if any other stolen property was in the house; and Turney turned on the light and told the officers they were welcome to look. They went in and found nothing except the connection to the sink, which was returned to Nelson with the other property.

Were the appellants' constitutional protections against unreasonable search and seizure violated by the entrance into the home of the father-in-law and the obtaining of the hot water tank and sink and connection to the sink? According to the State's evidence, Turney and Williams voluntarily brought the hot water tank and sink from the house before the officers entered the house, so as to these articles there was no entry of the building by the officers. It is only as regards the connection to the sink that the officers entered the house of the father-in-law, who was not shown to have been present or anywhere in the vicinity or in any wise connected with any part of the case. Only the appellants are objecting to the actions of the officers. What we have said in regard to waiver and consent in the search of the trailer applies with equal force to the articles found in the house of Turney's father-in-law; so the defendants' constitutional rights against unreasonable search and seizure were not violated. * * * "

The Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. And once a case is otherwise before it, the

Court generally will not re-examine the state court's findings and conclusions of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160.

By question four appellant contends his constitutional rights were violated when the allegedly coerced confessions of his accomplices were admitted in evidence. Appellant seeks to raise the question of his accomplices' confessions although he too confessed to the crimes, but did not then, nor now, contend his confession was involuntary. Under these circumstances it would seem any federal question appellant might have raised concerning this matter would be deemed insubstantial.

Under the decision of *Jackson* v. *Denno*, ... U.S. ....., 12 L. Ed. 2d 908, 84 S. Ct. ....., relied on by appellant, a defendant in a criminal case has a constitutional right at some stage in the proceedings to object to the use of an allegedly involuntary confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Appellant complains at page 23 of his jurisdictional statement that "the jury was not instructed in any manner concerning the voluntariness of such confession." Under Arkansas procedural rules it is not the duty of the trial court to give an instruction on any point unless a correct instruction is requested on that point. *Pate* v. *State*, 206 Ark. 693, 177 S.W. 2d 933 (1944); *Hays* v. *State*, 219 Ark. 301, 241 S.W. 2d 266 (1951). The Arkansas Supreme Court stated at page 572 of their opinion that "the issue of the voluntariness of the confessions was submitted to the jury under instructions not here claimed to be erroneous." The court below apparently felt appellant should have re-

quested an instruction on the voluntariness of the confessions or an instruction to disregard any confession made by his accomplices pertaining to him; and his failure to do so foreclosed the question on appeal. It is clear appellant did not follow state procedure in raising the question which he was required to do to preserve the question for review by this Court. *Ferguson* v. *Georgia*, 365 U.S. 570, 572.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed.

Respectfully submitted,
BRUCE BENNETT

Attorney General
By: RICHARD B. ADKISSON

Chief Assistant Attorney General
Attorneys for Appellee